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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BUN BUN TRAN,

Plaintiff and Appellant,

v.

LEONEL ARELLANO et al.,

Defendants and Respondents.

D057162

(Super. Ct. No. 37-2007-00065432-
CU-PA-CTL)

APPEAL from an order of the Superior Court of San Diego County, Linda B. Quinn, Judge. Reversed.

Bun Bun Tran appeals from the order granting Leonel Arellano's motion to waive the bond required in his appeal from a \$24,804,135 personal injury judgment in favor of Tran. Among other things, Tran contends the court erred in finding Arellano indigent. We agree and reverse the order.

FACTUAL AND PROCECURAL BACKGROUND

The parties do not dispute the underlying facts of this case. In November 2006, Arellano ran a stop sign and struck the vehicle driven by Tran. Having suffered serious

brain injuries as a result of the collision, Tran now requires 24-hour medical and nursing care. Arellano, an undocumented worker, was driving while intoxicated and pleaded guilty to various felonies in connection with the collision. He is currently in prison. The judgment of conviction included a restitution order obligating Arellano to compensate Tran and his mother for the damage he caused.

In this civil action for personal injury, the jury returned a \$24,804,135 verdict in Tran's favor. Arellano's appeal of the judgment in the personal injury action is pending in this court.

Progressive West Insurance Company (Progressive) insured Arellano at the time of the accident. The policy limit was \$15,000. Arellano's attorney contacted Progressive on his client's behalf, asking the insurer to post the bond necessary for Arellano to perfect his appeal of the judgment. Progressive responded that it would post an appeal bond up to the \$15,000 policy limit and no more.

Arellano filed a motion to waive the appeal bond on grounds that he was indigent and unable to obtain sufficient sureties. In support of the motion, Arellano filed a declaration describing his financial condition, and letters from two sureties stating that Arellano failed to meet the requirements for a bond representing 150 percent of the personal injury judgment. Among other things, Arellano stated that he: (1) was represented by counsel; (2) earned wages for his work in prison and did not need that money to cover the necessities of life; (3) was insured by Progressive; (4) believed the policy limits were no longer in effect due to the insurer's bad faith; (5) assigned a portion

of his bad faith claims against Progressive to Tran but believed the claims he reserved for himself were valuable; and (6) received a \$35,000 settlement from Honda on his cross-complaint, held in his attorney's trust account, which Arellano felt should be paid to Tran in partial satisfaction of the judgment. Arellano also stated in his declaration that he was "not entirely comfortable with [the] motion," but gave his "insurance company appointed attorney permission to file [it] because [he did] not want to be accused of violating the cooperation clause in [his] insurance policy."

Tran opposed the motion, arguing that Progressive had a duty to post an appeal bond for the entire over-limits judgment, the Progressive policy was ambiguous regarding the insurer's obligation to post an appeal bond, and, in any event, Arellano was not indigent. Tran also maintained that Progressive was pursuing the appeal of the judgment for its own benefit, citing the separate bad faith action involving all three parties.

The court granted Tran's motion, finding that: (1) Arellano was indigent; (2) he had no assets; (3) the risk of Arellano being unable to satisfy the judgment was not increased by waiver of the appeal bond; and (4) the court had no jurisdiction over Progressive and the coverage issue was not before the court.

DISCUSSION

I. *Requests for Judicial Notice*

Before addressing the merits of Tran's claims regarding waiver of the appeal bond, we consider the parties' four requests for judicial notice under Evidence Code section 452, subdivisions (d), (g) and (h) which provide:

"Judicial notice may be taken of the following matters to the extent that they are not embraced within [the mandatory notice provisions of] Section 451:

"(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

"(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

"(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

"Under the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required. Judicial notice is thus a substitute for formal proof." (1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 1, p. 102.) Evidence Code sections 452 and 459 permit an appellate court to take judicial notice of the records of any court in this state and the records of any court of record of the United States, but not necessarily the truth of their content. (1 Witkin, Cal. Evidence, *supra*, Judicial Notice, § 25, pp. 119-120; see *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1570.)

The parties' requests for judicial notice consist of:

1. Tran's June 3, 2010 request for judicial notice includes various orders and pleadings filed in connection with the separate bad faith litigation in Orange County Superior Court, U.S. District Court for the Central District of California, and U.S. District Court for the Southern District of California. Tran argues they are relevant to show Progressive's motivation for urging filing of the appeal over Arellano's objections.

Neither Progressive's nor Arellano's reasons for appealing the personal injury judgment are relevant to the question before us in this appeal. Accordingly, we grant Tran's request for judicial notice only to the extent the documents establish the existence of separate bad faith litigation involving Tran, Arellano and Progressive.

2. We deny Arellano's July 1, 2010 request for judicial notice in support of respondent's brief which lists six documents related to Tran's March 4, 2010 petition for writ of mandate. Arellano fails to state the grounds for his request or submit copies of the documents subject to the request.

3. Tran's July 14, 2010 request for judicial notice includes five of the same documents he submitted with his June 3, 2010 request. We deny Tran's July 14, 2010 request on the same ground.

4. We also deny Tran's August 3, 2010 request for judicial notice in support of his answer to the amicus brief filed by Horvitz & Levy. This request directs our attention to a list of "Representative Clients" taken from the firm's web site which included Progressive. Tran offers the list as "relevant to show that Horvitz & Levy have a direct pecuniary interest in this litigation and are not a disinterested party but are representing their client Progressive." The law firm's web-based advertising does not satisfy the reliability requirements of Evidence Code section 452, subdivision (h). In any event, after considering the declaration offered in the response filed by Horvitz & Levy, we are satisfied that the law firm does not currently represent Progressive or any party to this action.

II. *Arellano Is Not Indigent*

Code of Civil Procedure section 916, subdivision (a) provides: "[P]erfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from . . . , including enforcement of the judgment or order" (Undesignated statutory references are to the Code of Civil Procedure.) However, where, as here, the judgment is for "[m]oney or the payment of money," the perfecting of an appeal does not stay enforcement unless an undertaking or bond is provided by the appellant. (§§ 917.1, subd. (a)(1), 995.140, subd. (a), 995.190.) "The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order." (§ 917.1, subd. (b).) However, section 995.240 authorizes the trial court to waive the appeal bond under specified circumstances:

"The court may, *in its discretion*, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, *if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties*, whether personal or admitted surety insurers. In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived." (Italics added.)

The party seeking waiver of a filing fee or bond has the burden of proof to show entitlement to such relief. (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 658-659; *Williams v. FreedomCard, Inc.* (2004) 123 Cal.App.4th 609, 614.)

The only issue before us in this appeal is whether the court abused its discretion in granting Arellano's motion to waive the appeal bond pursuant to section 995.240. Contrary to Tran's argument, the abuse of discretion standard applies to our review of the order. (*Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 431 (*Alshafie*)). Where a party obtains in forma pauperis status, indigence is established as a matter of law. Otherwise, the question whether a party is indigent for purposes of waiving bond requirements is left to the trial court's discretion. (*Ibid.*) Tran may not shift the accepted standard to de novo review by simply asserting that this is a case of first impression involving pure questions of law. (See *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712-713.)

The court must exercise its discretion under section 995.240 "in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Bailey v. Taaffe* (1866) 29 Cal. 422, 424; *Alshafie, supra*, 171 Cal.App.4th at pp. 431-432.) Moreover, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action'" (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) "[W]e can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' [Citation.]" (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Competing policies inform the court's discretion in granting waivers from fees, costs, and undertakings at different stages in civil proceedings. The statutes and rules which allow persons to waive initial filing fees and proceed in forma pauperis reflect two

important policies. First, "our legal system cannot provide 'equal justice under law' unless all persons have access to the courts without regard to their economic means," and second, "fiscal responsibility should be tempered with concern for litigants' rights to access the justice system." (Gov. Code, § 68630, subs. (a) & (b).)

The additional policy of protecting a litigant's financial interest comes into play when a party seeks waiver of security for costs or damages on grounds of indigence. (See *Conover v. Hall* (1974) 11 Cal.3d 842, 851 [injunction bond]; see also *Alshafie, supra*, 171 Cal.App.4th at p. 429 [§ 1030 security for costs].) Section 1030, which requires out-of-state plaintiffs to file an undertaking to secure costs and/or attorney fees, addresses ""the difficulty of enforcing a judgment for costs against a person who is not within the court's jurisdiction."" [Citation.]" (*Alshafie, supra*, 171 Cal.App.4th at p. 428.) "The public policy underlying an indigent's entitlement to a waiver of security costs [pursuant to section 995.240] is essentially 'access trumps comfort.'" (*Id.* at p. 429, quoting *Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1442 (conc. opn. of Johnson, J.) (*Baltayan*).) Similarly, when ruling on motions to waive *appeal* bonds under sections 917.1 and 995.240, courts should balance the policy of protecting a litigant's financial interest against the policy favoring right of access.

Given the competing policies regarding waiver of fees and undertakings, it is no surprise that there is no single definition of "indigence" applicable to litigants at all stages of civil proceedings. In *Alshafie, supra*, 171 Cal.App.4th 421, and *Baltayan, supra*, 90 Cal.App.4th 1427, the courts considered section 995.240 motions for relief from posting

the undertaking required under section 1030. Plaintiffs in those cases had not applied for or obtained in forma pauperis status, and the *Alshafie* court observed "there [was] no rigid standard for the requisite showing of indigency" (*Alshafie, supra*, 171 Cal.App.4th at pp. 432, 434.) In this case, the uncontradicted facts show that Arellano was *not* indigent for purposes of section 995.240, and given the additional policy considerations, no court could reasonably have concluded that he was.

Arellano is currently in prison and declared that all the necessities of life are provided for him there. Although Arellano has no money in the bank, he possesses two assets of considerable value: (1) the \$35,000 settlement paid by Honda on Arellano's cross-complaint which Arellano's attorney holds in his client trust account; and (2) the Progressive insurance policy worth, at minimum, \$15,000. It appears that Progressive has provided representation for Arellano throughout the personal injury action. Based on this uncontradicted record of assets in Arellano's possession, the court's finding that he was indigent for purposes of section 995.240 is not reasonable, regardless of how vague the standard might be.

Arellano suggests that simple inability to pay an appeal bond is enough to satisfy the requirements for waiver under section 995.240. As a practical matter, neither Arellano nor any middle-class person would be able to secure the \$36 million bond required in this case. Moreover, if ability to pay were the rule, litigants subject to stiff judgments could obtain a nearly automatic waiver without the court considering the opposing party's legitimate interest in securing the judgment pending appeal.

Here, the court also ignored practical considerations of a waiver's effect on Tran's ability to execute the \$24 million judgment or the criminal restitution order against Arellano's limited assets. (See § 995.240 [additional factors shall include "the potential harm to the beneficiary if the provision for the bond is waived"].) Arellano stated in his declaration that "[a]s of now, Progressive has declined to post any bond." Tran argues that "Progressive, by refusing to post the bond, artificially created Arellano's purported indigency for its own benefit so that Progressive may appeal without posting a bond, over Arellano's objections, and use the appeal to gain a tactical advantage in the bad faith case between Arellano and Progressive." However, until Progressive does, in fact, refuse to provide all or part of the \$36 million bond, the question of what is required under the allegedly ambiguous policy language is not before us. And in any event, Progressive's and Arellano's reasons for appealing the personal injury judgment are irrelevant to the question whether Arellano satisfied the waiver requirements under section 995.240.

Considering the factors which *are* relevant under section 995.240 and the related policy concerns, a court could reasonably conclude that *denial* of waiver would allow Tran to execute against the assets Arellano does possess during the pendency of the appeal, as he argued below. Thus, if Arellano ultimately posts a partial bond, be it from Progressive alone or in combination with funds held by Arellano, Tran can execute against assets in excess of the posted amount. Arellano's declaration makes clear that he wants the \$35,000 Honda settlement paid to Tran and understands his obligations under the separate criminal restitution order.

For all the foregoing reasons, we conclude the trial court abused its discretion in granting Arellano's request for waiver of the appeal bond under section 995.240 and reverse the order.

DISPOSITION

The order is reversed. Tran shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.